In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

No. 154

ANDERSON NATIONAL BANK, etc.,
Appellant,

vs.

H. CLYDE REEVES, individually and as Commissioner of Revenue of the State of Kentucky, etc., et al.,
Respondents.

Appeal from the Court of Appeals of the State of Kentucky.

BRIEF AND ARGUMENT

Filed by the State of California, As Amicus Curiae.

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PRELIMINARY STATEMENT.

The State of California files this brief as *amicus curiae* in support of the position of respondents.

The State of California has a special interest in the question involved because it, also, has escheat statutes which apply to national banks as well as to state banks. Sections 1273 and 1272 of the California Code

of Civil Procedure and Section 15 of the Bank Act of California, General Laws, Act 652, which set out the California escheat laws, appear in the appendix.

These statutes provide for the escheat of abandoned accounts after a period of twenty years and also for a proceeding by which claimants may recover from the state their interest in said accounts.

California is particularly interested in this proceeding because the appellants base their contention on the case of *First National Bank of San Jose v. State of California,* 262 U.S. 366, which held that the California statutes could not be applied to abandoned accounts on deposit with national banks, although it was subsequently held that the statutes could be applied to abandoned accounts on deposit with state banks. *Security Savings Bank v. State of California,* 263 U.S. 282.

ARGUMENT.

I.

THE RATIONALE OF FIRST NATIONAL BANK OF SAN JOSE v. STATE OF CALIFORNIA IS BASED ON AN EXTENSION OF THE RULE LAID DOWN IN McCULLOCH v. MARYLAND, WHICH HAS SINCE BEEN MODIFIED BY THIS COURT.

In the "San Jose case" this court, speaking through Justice McReynolds, pointed out that national banks were instrumentalities of the federal government; that they performed their functions by accepting deposits of money; that although "their contracts and dealings are subject to the operation of general and undiscriminatory state laws which do not conflict with

the letter or the general object and purposes of congressional legislation * * * any attempt to define their duties or control the conduct of their affairs is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was vested". (262 U.S. 368, 369.)

Of course, we have no quarrel with this general rule.

In support of this general rule three cases were cited by the court: *Davis v. Elmira Savings Bank,* 161 U.S. 275, 283, 288, 290; *Farmers' & M. Nat. Bk. v. Dearing,* 91 U.S. 29, 33, 34; and, *Easton v. Iowa,* 188 U.S. 220, 229.

The case of *Davis v. Elmira Savings Bank, supra,* held that the New York insolvency law granting certain preferences on liquidation fell before the provisions of Revised Statutes 5236, 5342, which compelled a ratable distribution of the assets of insolvent national banks. In other words, the Congress which created the national banks controlled their liquidation.

In the case of *Farmers' & M. Nat. Bk. v. Dearing, supra,* the attack was on a state statute providing for a penalty for usury which was greater than the penalty under the National Bank Act. Congress having acted within its field the state statute could not be applied.

Easton v. Iowa, supra, was concerned with the penal provisions of a state statute making it an offense for

an insolvent bank to receive deposits. This court held that the organization, determination of insolvency and liquidation of national banks were provided for by congressional enactment and that it was "a symmetrical and complete scheme".

The three state statutes which were under attack in the above case were laws which ran directly afoul of congressional legislation in a field in which Congress was supreme.

The fulcrum used to support the rationale of the court in the "San Jose case" is really to be found in the epigrammatic statement of Marshall, in the case of *M'Culloch v. Maryland,* 4 Wheat. 316:

"the power to tax involves the power to destroy."

Here is an illustration of government by slogan.

M'Culloch v. Maryland, supra, was followed with emphasis in *Osborn v. Bank of U. S.,* 9 Wheat. 738.

In each of these cases the court struck down state taxing statutes which attempted to levy taxes on the right of a federal instrumentality, the Bank of the United States, to perform the very governmental function assigned to it by the Congress. The taxing statutes in question were aimed directly at the Bank of the United States and even a cursory knowledge of the history of the time discloses that the purpose of these statutes was to cripple the bank and destroy its effectiveness and thus thwart the Congress in the exercise of one of the functions of the new federal state.

Thus, when Marshall spoke,

"the power to tax involves the power to destroy"

he was not epitomizing a philosophy, he was striking at a fact which presented an imminent peril to the proper exercise of a governmental function.

Using the quoted words of Marshall as a text, the process of "judicial exegesis" set in until in the "San Jose case", this court struck down an ordinary statute (some counterpart of which exists in every state) providing indiscriminately for the escheat to the state of abandoned property.

Indeed, the labor of the judicial exegete became so vigorous that Justice Holmes was forced to protest in the case of *Panhandle Oil Co. v. Mississippi, ex rel. Knox,* 277 U.S. 218, and he there stated:

> "The power to tax is not the power to destroy while this court sits."

Justice Frankfurter took up this note of dissent in his concurring opinion in the case of *Graves v. New York,* 306 U.S. 466, 490:

> "All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions'. The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: 'The power to tax is not the power to destroy while this Court sits.'"

Into this "web of unreality" the ordinary escheat statutes of the several states have been drawn via the

"San Jose case" and from this web we now ask this court to extricate them.

II.

THE NATURE OF ESCHEAT LAWS AND THEIR GENERAL APPLICATION.

There are many authorities to the effect that the state has the sole and exclusive power over the disposition of property under its jurisdiction.

United States v. Fox, 94 U.S. 315;
Sunderland v. United States, 266 U.S. 226;
United States v. Perkins, 163 U.S. 625;
Beaver v. Short, 300 Fed. 113.

In the case of

Hamilton v. Brown, 161 U.S. 256,

the Supreme Court of the United States lays down the rule as follows (at p. 263):

> "By the law of England, before the Declaration of Independence, the lands of a man dying intestate and without lawful heirs reverted by escheat to the King as the sovereign Lord; but the King's title was not complete without an actual entry upon the land, or judicial proceedings to ascertain the want of heirs and devisees. *Attorney General of Ontario v. Mercer*, 8 App. Cas. 767, 772, 2 Bl. Com. 245. The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the Court of Chancery, but was really a proceeding at common law; and, if it resulted in favor of the King, then, by virtue of ancient statutes, any one claiming title in the lands might, by leave

of that court, file a traverse, in the nature of a plea or defence to the King's claim, and not in the nature of an original suit. Lord Somers, in *The Bankers'* case, 14 Howell's State Trials, 1, 83; Ex parte Webster, 6 Ves. 809; Ex parte Gwydir, 4 Maddock, 281; In re Parry, L. R. 2 Eq. 95; *People v. Cutting*, 3 Johns. 1; *Briggs v. Light-Boats*, 11 Allen, 157, 172. The inquest of office was a proceeding in rem; when there was a proper office found for the King, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the King's favor. Bayley, J., in *Doe v. Redfern*, 12 East, 96, 103; 16 Vin. Ab. 86, pl. 1.

"In this country, when the title to land fails for want of heirs and devisees, *it escheats to the State* as part of its common ownership, either by mere operation of law, or upon an inquest of office, *according to the law of the particular State*. 4 Kent Com. 424; 3 Washb. Real Prop. (4th Ed.) 47, 48." (Emphasis supplied.)

See also,

United States v. Repentigny, 72 U.S. 211.

Even money deposited in the United States Treasury when an escheat occurs escheats to the state where it was originally situated.

United States v. Klein, 303 U.S. 276;

American Loan & Trust Co. v. Grand Rivers Co., 159 Fed. 775.

Statutes providing for escheat have been held to be part of the intestate laws of a state.

People v. Richardson, 269 Ill. 275, 109 N.E. 1033;

29 *Harvard Law Review*, 455.

This being the case it is all the more evident that there can be no federal escheat statute. Laws governing the devolution of property have always been the subject of exclusive state jurisdiction.

Cardozo, when sitting on the New York Court of Appeals, said:

> "The state as the ultimate owner is in effect the ultimate heir. * * *
>
> "Now the feudal tenures are abolished ( ) and all lands within the state are declared to be allodial ( ). What was once an incident of tenure has become an incident of sovereignty. * * * 'In personal estates, which are allodial by law, the king,' said Lord Mansfield ( ), 'is last heir where no kin.' With tenures abolished, succession is by right whether the subject of escheat is personal estate or real."
>
> *In re Melrose Ave. in Borough of the Bronx*, 234 N.Y. 48, 136 N.E. 235.

By the Tenth Amendment to the Constitution of the United States all powers not delegated to the United States nor prohibited to the states are reserved to the states. By this reservation the rights of sovereignty are guaranteed to the states by the Constitution. Ordinarily no act of Congress can subtract an attribute of sovereignty from a state.

III.

THE ORDINARY ESCHEAT STATUTES DO NOT INTERFERE WITH THE GOVERNMENTAL FUNCTIONS OF NATIONAL BANKS NOR DO THEY INTERFERE WITH THE CONTRACT BETWEEN THE BANK AND ITS DEPOSITORS.

We recognize that the Congress is empowered to borrow money; that implied from this power is the right to set up a national banking system; that it may therefore provide for a complete and symmetrical system for the organization, government and liquidation of national banks; and, that if the Congress wished to prescribe the terms of a contract between a national bank and its depositors, it could do so.

However, the Congress has not attempted to prescribe the terms of the contract of deposit between a depositor and a national bank.

Indeed, this court so stated in the "San Jose case":

> "These banks are instrumentalities of the Federal government. Their contracts and dealings are subject to the operation of general and undiscriminating state laws which do not conflict with the letter or the general object and purposes of congressional legislation." (262 U.S. 369.)

The effect of an escheat statute on the relationship between a bank and its depositors is set out in the case of *Germantown Tr. Co. v. Powell*, 265 Pa. 71, at page 77:

> "The agreement of the bank or depositary, however, is merely to keep the money of the depositor until it is demanded by the owner, or his duly authorized representatives. It agrees to pay on demand. When demand is made the contractual

relation ceases, there being no vested right to continue the contract in force thereafter, or for any definite time. If the depositor should die or make an assignment, his personal representative or assignee succeeds to his right to make demand for the money and the bank is in duty bound to make payment. A statute of escheat, in effect, simply provides for a termination of the contract of deposit, at the instance of the Commonwealth and by virtue of its sovereign power, where there are no heirs to claim the property, after the death of the owner, or after expiration of such reasonable time as may be fixed by law to raise a presumption of death. While the act requires the filing of certain reports for the information of the Commonwealth a considerable time before an escheat is declared, this provision is reasonable and enables the Commonwealth to follow up property as to which there is no apparent claim of ownership. The right of escheat has been recognized under the English law from the earliest times and has also been the subject of continuous statutory regulation in Pennsylvania from colonial days, the latest general law on the subject being the Act of May 2, 1889, P. L. 66; the validity of these acts has been sustained without suggestion that their enforcement violates any contract between the owner of the property and the person or institution in whose hands the property was deposited or placed for keeping."

The California escheat statute is nothing more than an assertion by the state of its sovereign right to take possession of abandoned property. The statute is not aimed at national banks but operates indiscriminately on all property within its borders.

Nor can it be said that such a statute frustrates the purposes or impairs the efficiency of a bank. State banks have been subject to such statutes and no one has contended that the statutes have impaired their efficiency. If such statutes had reacted unfavorably on the competitive position of the state banks, the state legislature would undoubtedly have given them relief.

We do not believe that the efficiency of national banks depends on their ability to retain indefinite possession of abandoned accounts. The accounts of those active in trade and commerce are the life blood of any bank, state or national. Small, inactive accounts are notoriously unprofitable. Such dormant accounts are a constant temptation to peculations on the part of minor employees.

Escheat statutes are not unlike statutes of succession. The state stands in the place of the owner of abandoned property just as an administrator or executor stands in the place of the deceased owner of property. If an executor or administrator withdraws the decedent's money from the bank, he reduces the amount of available funds on deposit in the bank and to some degree lessens its ability to lend money to the government. But no one would contend this would affect the operations of the bank.

A receiver of a corporation appointed by a state court in accordance with state law might withdraw

from a national bank funds under his control as receiver. But by such act he would not be interfering with the governmental functions of the bank.

A sheriff armed with a writ of attachment, or garnishment, or execution, or any one of a number of other writs could vitally affect the contract between the bank and the depositors. However, if a national bank was involved, could it be seriously said that the sheriff was interfering with the bank's performance of an essential governmental function?

CONCLUSION.

We believe that this court should review the decision in the "San Jose case".

The states operating under escheat statutes are not attacking national banks or their functions. Nor are the states attempting to thwart the national government in its efforts to borrow money. In California the state government has upwards of $155,000,000 on deposit in national banks and holds an investment of $150,000,000 in government bonds.

The writers of this brief are not among the devotees at the shrine of "state rights". We are sympathetic with every effort of the federal government to exercise its functions. We do not believe, however, that the necessities of the federal government require it to

strike down the escheat laws of the several states enacted under their sovereign powers.

The judgment should be affirmed.

Dated, San Francisco, California,
December 27, 1943.

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(Appendix Follows.)

Appendix

California Code of Civil Procedure, Section 1273.

All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or withdrawn any part thereof or the interest, and which shall have remained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor nor any claimant has filed any notice with such bank showing his or her present residence, shall, with the increase and proceeds thereof, escheat to the state.

Whenever the attorney-general shall be informed of such deposits, he shall commence an action or actions in the name of the State of California, in the superior court for the county of Sacramento, in which shall be joined as parties the bank or banks in which the moneys are deposited and the names of all such depositors. All or any number of depositors or banks may be included in one action.

Service of process in such action or actions shall be made by delivery of a copy of the complaint and summons to the president, cashier or managing officer of each defendant bank, and by publication of a copy of such summons in a newspaper of general circulation published in said county for a period of four weeks.

Upon the trial the court must hear all parties who have appeared therein and if it be determined that

the moneys deposited in any defendant bank or banks are unclaimed as hereinabove stated, then the court must render judgment in favor of the state declaring that said moneys have escheated to the state and commanding said bank or banks to forthwith deposit all such moneys with the state treasurer, to be received, invested, accounted for and paid out in the same manner and by the same officers as is provided in the case of other escheated property.

California Code of Civil Procedure, Section 1272.

Within five years after judgment in any proceeding had under this title, a person not a party or privy to such proceeding may file a petition in the superior court of the county of Sacramento, showing his claim or right to the property, or the proceeds thereof.

Said petition shall be verified, and, among other things must state:

The full name, and the place and date of birth of the decedent whose estate, or any part thereof, is claimed.

The full name of such decedent's father and the maiden name of his mother, the places and dates of their respective births, the place and date of their marriage, the full names of all children the issue of such marriage, with the date of birth of each, and the place and date of death of all children of such marriage who have died unmarried and without issue.

Whether or not such decedent was ever married, and if so, where, when and to whom.

How, when and where such marriage, if any, was dissolved.

Whether or not said decedent was ever remarried, and, if so, where, when and to whom.

The full names, and the dates and places of birth of all lineal descendants, if any, of said decedent; the dates and places of death of any thereof who died prior to the filing of such petition; and the places of residence of all who are then surviving, with the degree of relationship of each of such survivors to said decedent.

Whether any of the brothers or sisters of such decedent ever married, and, if so, where, when and whom.

The full names, and the places and dates of birth of all children the issue of the marriage of any such brother or sister of decedent, and the date and place of death of all deceased nephews and nieces of said decedent.

Whether or not said decedent, if of foreign birth, ever became a naturalized citizen of the United States, and if so, when, where and by what court citizenship was conferred.

The post-office names of the cities, towns or other places, each in its appropriate connection, wherein are preserved the records of the births, marriages and deaths hereinbefore enumerated, and, if known, the title of the public official or other person having custody of such records.

If for any reason, the petitioner is unable to set forth any of the matters or things hereinabove required, he shall clearly state such reason in his petition.

A copy of such petition must be served on the attorney general at least twenty days before the hearing of the petition, who must answer the same.

And the court thereupon must try the issue as issues are tried in civil actions, and if it is determined that such person is entitled to the property, or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or if it has been sold and the proceeds paid into the state treasury, then it must order the controller to draw his warrant on the treasury for the payment of the same, but without interest or cost to the state, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant.

All persons who fail to appear and file their petitions within the time limited are forever barred; saving, however, to infants, and persons of unsound mind, the right to appear and file their petitions at any time within the time limited, or within one year after their respective disabilities cease.

Section 15 of the California Bank Act.

All amounts of money heretofore or hereafter deposited with any bank to the credit of depositors who have not made a deposit on said account or with-

drawn any part thereof or the interest and which shall have remained unclaimed for more than twenty years after the date of such deposit, or withdrawal of any part of principal or interest, and where neither the depositor nor any claimant has filed any notice with such bank showing his or present residence, shall, with the increase and proceeds thereof, be deposited with the state treasurer after judgment in the manner provided in the Code of Civil Procedure. At the time of issuing the summons in the action provided for in section one thousand two hundred seventy-three of the Code of Civil Procedure, the clerk shall also issue a notice signed by him, giving the title and number of said action, and referring to the complaint therein, and directed to all persons, other than those named as defendants therein, claiming any interest in any deposit mentioned in said complaint and requiring them to appear within sixty days after the first publication of such summons, and show cause, if any they have, why the moneys involved in said action should not be deposited with the state treasurer as in said section provided, and notifying them that if they do not so appear and show cause, the state will apply to the court for the relief demanded in the complaint. A copy of said notice shall be attached to and published with a copy of said summons required to be published by said section, and at the end of the copy of such notice so published there shall be a statement of the date of first publication of said summons and notice. Any person interested may appear in said action and become a party thereto. Upon the completion of the

publication of the summons and notice, and the service of the summons on the defendant bank, or banks, as in said section one thousand two hundred seventy-three of the Code of Civil Procedure provided, the court shall have full and complete jurisdiction over the state, and the said deposits and of the person of everyone having or claiming any interest in the said deposits, or any of them, and shall have full and complete jurisdiction to hear and determine the issues therein, and render the appropriate judgment thereon.

Statement concerning deceased depositors and accounts dormant twenty years.

The president or managing officer of every bank must, within fifteen days after the first day of January of every year, return to the superintendent of banks and to the state controller a sworn statement showing the names of depositors known to be dead, or who have not made further deposits, or withdrawn any moneys during the preceding twenty years and not known to be living, and the amount of whose deposit is more than ten dollars. Such statement shall show in detail the following matters, viz.:

First—The name and last known place of residence or postoffice address of the person making such deposit;

Second—The amount and and date of such deposit and whether the same are in moneys or securities, and if the latter, the nature of the same;

Third—The interest due on such deposit, if any, and the amount thereof;

Fourth—The sum total of such deposit, together with the interest added thereto due from such bank on account of such deposit or deposits and the interest thereon to such depositor, but nothing contained herein shall require any corporation or person renting lock boxes or safes in vaults for storage purposes to open or report concerning property stored therein. Such reports itemized as aforesaid shall be signed by the person making the same and shall be sworn to before a person competent to administer oaths as a full, complete and truthful statement of each of the items therein contained.

Statement concerning deceased depositors and accounts dormant ten years.

The president or managing officer of every bank, must within fifteen days after the first day of January of every odd-numbered year, return to the superintendent of banks a sworn statement showing the names of depositors known to be dead, or who have not made further deposits, or withdrawn any moneys during the preceding ten years and not known to be living, and the amount of whose deposit is more than ten dollars. Such statements shall show the amount of the account, the depositor's last known place of residence or postoffice address, and the fact of death, if known to such president or managing officer. Such president or managing officer must give notice of these deposits in one or more newspapers published in or nearest to the town or city where such bank has its principal place of business, at least once a week for four con-

secutive weeks, the cost of such publication to be paid pro rata out of such unclaimed deposits. The superintendent of banks must incorporate in his subsequent report such returns made to him as provided in this section. If any president or managing officer of any bank neglects or refuses to make the sworn statements required by this section such bank shall forfeit to the state of California the sum of one hundred dollars a day for each day such default shall continue. Any president or managing officer of any bank who violates any of the provisions of this section shall forfeit to the state of California the sum of one hundred dollars a day for each and every day such violation shall continue. For the purposes of this section all deposits received by any bank under the provisions of section thirty-one, section thirty-one *a* or section thirty-one *b* of this act shall be deed to have been deposited with such bank at the time the deposit was made with the bank from which the deposit was transferred; provided, that any bank which shall make any deposit with the state treasurer in conformity with the provisions of this section shall not thereafter be liable to any person for the same and any action which may be brought by any person against any bank for moneys so deposited with the state treasurer shall be defended by the attorney general without cost to such bank. (Amended by Stats. 1913, p. 145; Stats. 1915, p. 1106; Stats. 1921, p. 1365; Stats. 1925, p. 510.)

Annotation: See 4 Cal.Jr. 230; note, 31 A.L.R. 398 (constitutionality of statutes relating to disposition of old bank deposits).

This section satisfied the requirements as to due process of law: Security Sav. Bank v. State, 263 U.S. 282, 31 A.L.R. 391, 68 L. Ed. 301, 44 Sup. Ct. 108.

This section and Code Civ. Proc. p. 1273, are correlative and deal with the same subject matter: State v. Security Savings Bank, 186 Cal. 419, 199 Pac. 791; affirmed 263 U.S. 282, 31 A.L.R. 391, 68 L. Ed. 301, 44 Sup. Ct. 108. See, also, Matthews v. Savings Union Bank & Trust Co., 43 Cal. App. 45, 184 Pac. 418.

This section and Code Civ. Proc. p. 1273, providing for escheat to the state of deposits in banks where no entries or withdrawals have been made for twenty years and the whereabouts of the depositors are unknown, attempt to qualify agreements between national banks and their customers with respect to deposits which banks are authorized to receive under Rev. Stats. p. 5136, and are invalid: First Nat. Bank of San Jose v. State, 262 U.S. 366, 67 L. Ed. 1030, 43 Sup. Ct. 602.